In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT CULINARY WORKERS UNION LOCAL 226, IN OPPOSITION

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BRIEF FOR RESPONDENT CULINARY WORKERS UNION, LOCAL 226, IN OPPOSITION

QUESTIONS PRESENTED

Both the United States District Court for the District of Nevada and the Court of Appeals addressed themselves in the proceedings below to the question

of the applicability of the Railway Labor Act (RLA, 45 U.S.C. §§ 151, et seq.) to the activities in which petitioner is engaged at the Nuclear Rocket Development Station (NRDS) at Jackass Flats, Nevada, under contract from the Atomic Energy Commission (AEC) (App. A, pp. 17, 2a).[1] The issue was whether respondents' picketing of those activities was subject to the regulatory provisions of the RLA because Pan American World Airways Inc. (Pan Am) was otherwise a carrier by air for its airline services. If the RLA was applicable, even though admittedly the NRDS operation was unrelated to transportation by air, the United States District Court, it was argued, was not deprived of jurisdiction to restrain respondents' picketing by reason of the provisions of the Norris-La Guardia Act (29 U.S.C. §§ 101-115) (App. A, p. 3a).

Accordingly, the true question arising from the decisions below is:

If an employer is a carrier by air under the Railway Labor Act for its airline activities, do the Federal Courts have jurisdiction to enjoin a labor organization from peacefully picketing in connection with a labor dispute involving exclusively an operation of the employer which is wholly unrelated to and physically separated from any of the employer's airline activities?

Both Courts below correctly answered this question in the negative.

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[1]References are to the Appendices to the Petition on file herein.

The lower Courts were properly concerned with *the nature of the employer's (Pan Am's) function* at NRDS, rather than with the type of skills exercised by the employees who carry out that function (App. A, p. 21a, 13a-15a). Therefore, conceding the necessity for determining, in such a case as this, which remedial labor legislation applies to the employees at NRDS, the second question would be:

Does the National Labor Relations Act (NLRA, 29 U.S.C. §§ 151, et seq.) or the Railway Labor Act apply to employees engaged in an operation of an employer which is unrelated to transportation by air if the employer is otherwise a carrier under the RLA for its transportation connected activities and if the work performed by employees of the non-transportation connected operation is substantially similar to work performed by some of the employer's transportation connected employees?

The Court of Appeals Opinion answers such a question, correctly, we believe, by finding that the employees at NRDS are entitled to the protection of the important rights guaranteed by the NLRA, and consequently, also, to the added immunity of the Norris-La Guardia Act in the exercise of protected concerted activities (App. A, pp. 13a-14a).

STATEMENT OF THE CASE

The analysis of the record herein and of the issues involved which appears in the opinions of both Courts below is clear, succinct and fully supported. We

therefore, rely upon these opinions as our statement of the case.

Pan Am in its "Statement of the Case" in its petition seeks to avoid the consequences of these findings and applicable law by returning to the same arguments heretofore made to both Courts below, to wit, that controlling weight should be given two rulings of the National Mediation Board (NMB) in which that administrative agency extended its jurisdiction beyond the limits of its authority under law so as to include under the RLA Pan Am's support services for the Government's missile and rocket activities at Cape Canaveral (Kennedy) and at NRDS (App. A, pp. 23a, 32a, 40a).[2]

ARGUMENT

1. THE DECISIONS BELOW CONFORM TO THE LANGUAGE OF THE RAILWAY LABOR ACT, THE CONGRESSIONAL PURPOSE AND INTENT IN ENACTING SUCH LEGISLATION, AND ACCORD WITH SOUND JUDICIAL AND ADMINISTRATIVE INTERPRETATION THEREOF.

Any careful examination of the language of the RLA such as was done by the Court of Appeals below necessarily reveals the clear Congressional purposes

[2]That the NMB may now have some belated second thoughts as to its course of conduct in this respect is revealed by its latest ruling made in response to a request by this respondent for reconsideration of its October 29, 1963 ruling. We attach hereto, as an Appendix to this Brief, a copy of said request for reconsideration and the Board's reply, both of which are a part of the Board's official File No. C-3367 referred to in the petition.

to be the regulation of labor relations solely in rail and air transportation.[3]

This Court has on a number of occasions dealt with the troubled history of labor relations on the railroads, and the special techniques devised by Congress, with the aid of railroad management and labor, to remedy the industry's unique labor problems have been exhaustively considered.

California v. Taylor, 353 U.S. 553;

Brotherhood of R. R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 31 (footnote 2);

Penn R. Co. v. Day, 360 U.S. 548, 557;

NLRB v. Jones & Laughlin, 301 U.S. 1.

See also:

Lecht, *Experience Under Railway Labor Regulations* (1955);

Garrison, *The Railroad Adjustment Board: a Unique Administrative Agency*, 46 Y.L.J. 567;

Report of House Committee on Interstate and Foreign Commerce, Rep. No. 2811, 81st Cong., 2d Sess. 5.

Starting with the decision of this Court in *Virginian R. Co. v. System Federation*, 300 U.S. 515, all courts have considered it necessary to show a connection other than "remote, tenuous or negligible"

[3]For an indication of consistent Congressional purpose when air line transportation was added to the coverage of the RLA in 1936, see *Hearings Before a Subcommittee of the Senate Committee on Interstate Commerce* on S. 2496, 74th Cong., 1st Sess., pp. 5, 9, 12; and 79 *Cong. Rec.* 10059.

with transportation for the RLA to become applicable to any given operation by a carrier. Both Courts below in the instant case relied principally upon *Jackson v. Northwest Airlines,* 70 F. Supp. 501 (1947), and *Northwest Airlines v. Jackson,* 185 F. 2d 74 (1950). We agree that those decisions are controlling and that they constitute reasoned interpretations of the RLA.[4] However, they do not stand alone by any means, and there is no conflict among the circuits or with the rulings of this Court on the law here involved. The Ninth Circuit itself in 1942 reached an almost identical conclusion in *Anderson v. Bigelow* (130 F. 2d 460), and this Court denied certiorari (317 U.S. 690). There the Court of Appeals refused to enjoin picketing in a labor dispute involving a rail carrier's trucking operation on the ground that the RLA was not applicable and therefore Federal Courts were without jurisdiction under the Norris-La Guardia Act.

This Court long ago adopted the obviously sound general proposition that merely because a company is a carrier under the law for some purposes does not necessarily make it a carrier for all purposes.

Kansas City Southern Ry. Co. v. U.S., 282 U.S. 760;

Santa Fe, Prescott Ry. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 188.

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[4] It is interesting that Pan Am itself was originally also of the same view as the Courts until persuaded otherwise by the NMB. See Pan Am's position expressed in the NMB November 9, 1956 decision (App. A, p. 34a).

It is this principle, together with the *Virginian*, supra, doctrine concerning the necessity for showing a relation to transportation which the Courts have consistently followed in determining the applicability of the RLA to particular activities of a carrier.

Roland v. United Airlines (D.C. for N.D. Ill. 1947), 75 F. Supp. 25;

Bullock v. Capitol Airways, Inc. (D.C. for E.D. N.Y. 1959), 176 F. Supp. 449;

Keele v. Union Pac. R. Co. (S.D. Cal. 1948), 78 F. Supp. 678;

Nelson v. Agwilines (S.D. N.Y. 1946), 70 F. Supp. 497;

Walling v. Connecticut Co. (C.A. 2, 1946), 154 F. 2d 552.

On the administrative side, the results are much the same—with the single exception of the NMB in these Pan Am cases. The Interstate Commerce Commission, which has the statutory duty under the RLA of defining the work of an employee of a carrier (45 U.S.C. 151, Fifth), refused to find that employees of a railroad engaged in servicing an office building owned by the carrier were covered by the RLA. In so ruling the Commission applied the *Virginian*, supra, test, saying, ". . . it is difficult to conceive how it (office building work) could be more remote, tenuous or negligible" (to the carrier's transportation activities).

Hudson and Manhattan Railroad Co. v. Employees-Railway Act, 245 I.C.C. 415, 425.

The NLRB has likewise refused to accept Pan Am's present contention, holding that such a theory would lead to an unlimited application of the RLA whenever a company operates to any extent as a carrier. *Northwest Airlines Inc.*, 47 NLRB 498, 501 (1943). Not only has the NLRB rejected Pan Am's contention in theory, it has also applied the opposite view in practice. See *Northern Redwood Lumber Co.*, 88 NLRB 272 (1950), where the NLRB assumed jurisdiction of a rail carrier's employees who were found to be more connected with the carrier's sawmill activities than with its rail operations. In that case some of the sawmill employees over whom the NLRB took jurisdiction were, as here, performing the same kind of work as the carrier's transportation employees.

These consistent and common sense interpretations of the law are in sharp contrast to the lonely view of the NMB that the employer's function is irrelevant; while similarity of the work performed by the employees is said to be the "controlling factor." (See App. A, p. 38a.)[5]

[5]Both Pan Am and amicus TWU agree that the NMB view of the law which they now embrace would necessarily extend NMB's jurisdiction to mechanics in a shoe factory operated by Pan Am. (Pet. p. 19, Footnote 15; TWU Br. p. 14, Footnote 6).

2. THE COURTS BELOW WERE BOUND TO REJECT THE RULINGS OF THE NATIONAL MEDIATION BOARD IN THAT SAID RULINGS WERE IN EXCESS OF THE BOARD'S LAWFUL AUTHORITY, WERE NOT WELL REASONED, AND WERE IN CONFLICT WITH SOUND JUDICIAL PRECEDENT. AS SUCH THE NMB DECISIONS AND PRACTICES IN THIS CASE ARE ENTITLED TO NO WEIGHT.

Petitioner herein, as well as amicus, advances as the principal argument for granting this Court's writ, the contention that the Court of Appeals failed to give weight to these prior decisions of the NMB.

This is not a case of judicial review of statutory administrative proceedings such as was involved in the cases cited in Pan Am's petition (p. 13) and in the Amicus Brief (p. 8). This is a separate judicial proceeding in equity instituted by Pan Am without prior administrative action in the same case. Even were it not such a case, however, it is clear that the NMB ruling would still be subject to reversal as being beyond its statutory authority and as an arbitrary abuse of power.

Leedom v. Kyne, 358 U.S. 184, 190;

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 140;

Airline Dispatchers Assn. v. NMB (C.A. D.C. 1951), 189 F. 2d 685;

Association for the Benefit of Non-Contract Employees v. NMB (D.C. for D.C. 1963), 218 F. Supp. 114.

Cf. *SUNA v. NMB*, 320 U.S. 297, 321 (dissenting opinion: "The special competence of the National Mediation Board lies in labor relations rather than in statutory construction.").

In any case, it is the ultimate duty of the Courts to construe statutes, and administrative practices thereunder are only persuasive when there has been a long, uniform and uninterrupted acquiescence therein; where the practices are reasonable; when they do not enlarge the statute; and where they are not in conflict with the purposes and policies of an Act of Congress. Moreover, *in the face of judicial construction there is no place for the doctrine of contemporaneous construction by executive officers.*[6]

People ex rel. Healy v. Shedd, 241 Ill. 155, 89 N.E. 332, affirmed 217 U.S. 597;
County of Marin v. U.S., 356 U.S. 412;
U. S. v. Shirey, 359 U.S. 255, 260-261;
Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325 U.S. 161, 169;
Clerical Employees Assn. v. Bro. Ry. Clerks, 85 F. 2d 152 (C.A. 7, 1936);
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 277.
See 78 L. ed. 322; 84 L. ed. 28 and cases there collected.

Only one U. S. District Court Judge has ever agreed with the NMB (*Biswanger v. Boyd*, 32 CCH Labor Cases § 70,840)[7] and in that case the District

[6]The Courts in the *Jackson* cases, supra, in 1947 and 1950, had criticized and specifically disapproved an administrative ruling under the RLA that a carrier's activities unrelated to transportation were covered by RLA. The NMB nevertheless thereafter refused to follow the Courts' construction of the Act in the Pan Am cases in 1956 and 1963, also ignoring, of course, *Anderson v. Bigelow* (1942), supra.

[7]The adversely affected labor organization had withdrawn from the case prior to the judicial proceedings, and no appeal was taken in *Biswanger v. Boyd*.

Judge summarily rejected the careful reasoning in the *Jackson* cases, supra. Instead, the Court purported to rely upon this Court's decision in *California v. Taylor*, supra. Had the Judge in *Biswanger*, supra, studied this Court's opinion in the *Taylor* case carefully, his conclusion must have been, as was the Court of Appeals in the instant case, that the RLA was intended to apply only to that "singular industry"—interstate transportation by rail (or air)—where "techniques peculiar to that industry" were required and devised by Congress. *California v. Taylor*, supra, at p. 569. No such special legislative treatment has been shown to be required or intended by Congress for the activity here involved, namely, the missile and space industry, an admittedly unrelated field.[8]

In the face of this overwhelming authority, legislative history, and the established labor policy of the United States, these abortive attempts by the NMB to expand its jurisdiction beyond the law can be given no respect by the Courts, and the Courts below had no choice but to reject them. They can have no standing now to support a petition for certiorari to this Court.

[8]See C. Guy Ferguson, "Strange New World", *Occupational Outlook Quarterly*, May 1963 (Vol. 7, No. 2). Note, however, that the executive branch of the Government has given special attention to labor relations in the missile industry (Executive Order No. 10946, May 26, 1961).

3. THE DECISION OF THE COURT OF APPEALS WAS NECESSARY TO PROTECT IMPORTANT STATUTORY RIGHTS OF THE RESPONDENTS, AND THE DECISION HAS NOW SETTLED THE LAW SO AS TO PERMIT ORDERLY ADMINISTRATION OF REMEDIAL LABOR LEGISLATION. THERE IS, THEREFORE, NO REQUIREMENT FOR THIS COURT TO ACT.

Petitioner relies, without any support in the record before the Courts below, upon its self-serving claim that there is some "common and direct interest for labor relations purposes" between the employees at NRDS, in the wilds of the Nevada desert some 90 miles from Las Vegas, and Pan Am's air transportation employees located at its widely separated air terminals (Pet. pp. 3, 12, 18; App. C, p. 65a),[9] From this Pan Am, and apparently the NMB, conclude that the remedial provisions of the RLA must be held to apply to NRDS in order to prevent labor disputes from affecting Pan Am's airline transportation activities. This, of course, is neither a new nor tenable argument for the expansion of the RLA beyond its statutory limits and purpose. Judge Nordbye in the *Jackson* case (70 F. Supp. 501, 513) termed the argument "unsound" and declared, with the approval of the Court of Appeals for the Eighth Circuit, that the possibility that a strike in one branch of a company would create difficulty in another branch scarcely required "universal application" of the RLA, commenting that under such a theory the sweep of the RLA would be "almost unlimited" (Id., 513).

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[9]See R. 401-411 for respondents' objection to the inclusion of the Yordy December 2, 1963 affidavit and related material in the record before this Court.

It is equally unsound to assume with the NMB that failure to apply the RLA to Pan Am's missile and space rocket operations will mean that labor relations in these areas will thereby go unregulated. Absent RLA coverage, the NLRA becomes applicable, as the Court of Appeals pointed out. It follows that the dispute settlement procedures of the Labor-Management Relations Act of 1947 become immediately available (29 U.S.C. §176, et seq.) So do the statutory injunctive rights available to the NLRB (e.g. NLRA §§ 8(b)7 and 10(1)). The services of the Federal Mediation and Conciliation Service could be called upon (29 U.S.C. §§ 171-174), and finally, the President's Missile Sites Commission is specifically charged with responsibility for avoiding such disputes (Executive Order 10946). There would seem to be far less confusion and administrative frustration involved in leaving air and rail transportation disputes to the NMB as Congress intended, and consigning disputes such as this one to these other agencies which are accustomed to them and have the experience with which to handle them.

A fundamental basis for the decision of the Court of Appeals below was a recognition of the necessity for according a proper respect to the rights conferred upon respondents and others by these other remedial labor statutes. It will not do to explain away *Jackson*, supra, as Pan Am attempts, on the ground that the decision in that case was necessary because exemptions from FLSA coverage are to be strictly construed to accomplish the broad remedial purposes of

the statute (Pet. p. 22). As the Court of Appeals saw, this is the very point involved in the instant matter. The NLRA, too, is a broad remedial statute which grants important rights in the public interest respecting self organization of employees and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 157). Thus, the NLRA exemption of RLA coverage (29 U.S.C. § 152(2), (3)) must also be strictly construed, and RLA intrusion into NLRA jurisdiction is not to be lightly inferred from the language of either statute. In the same manner, this Court's careful limitation of the theory of "accommodation" between other labor statutes and the Norris-La Guardia Act, supra, another remedial labor statute, must be respected. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195.

Among the important rights accorded this respondent under the NLRA is its right to bargain for an appropriate and historical unit of employees at the Nevada Test Site whom it has represented for over 13 years. That bargaining relationship has now been disrupted and respondent's members have lost their jobs as a result of the arbitrary application of Pan Am's Cape Canaveral collective bargaining contract with TWU to these Nevada employees (R. 228-231). As this Court noted in *California v. Taylor*, supra, "systemwide" agreements are a custom and practice, if not a necessity, in the railroad industry. This, however, is not a practice generally followed by the NLRB under the NLRA. In fact, in the case of a

new employer or a new operation, the NLRB almost always permits a self-determination election so that the employees may decide whether they wish to be separately represented.

Houck Transport Co., 130 NLRB 270;
Miratile Mfg. Company Inc., 124 NLRB 48;
Standard Trucking Company, 122 NLRB 761;
Rayette, Inc., 117 NLRB 1399;
Southern California Edison Co., 107 NLRB 951;
Comptometer Corporation, 135 NLRB 74.

Nor will the Board permit a preexisting collective bargaining agreement applicable to other operations of the employer to stand in the way of such an election.

Goodyear Tire and Rubber Co., 80 NLRB 1347;
Miratile Mfg. Co., supra.

The NLRB, as petitioner concedes (Pet. p. 18, footnote 14), is very much concerned with community of interests among employees. The NLRB, and not the NMB, is the proper agency to investigate those interests as they may exist for these local employees who make beds and perform other custodial work at Jackass Flats, Nevada, where there are no railroads or airlines and where the nearest Pan Am air terminal is hundreds of miles away. The NRDS employees, having no relation to air transportation, should have a right to locally determine questions of representation and the scope of collective bargaining without being thrown arbitrarily into a nationwide

assortment of Pan Am's airline mechanics and other "ground service" employees. Whether reference is made to a hypothetical shoe factory or hotel or to a real desert rocket test site makes little difference. Under no condition was the RLA designed or intended for such situations.

The decisions of the Eighth Circuit Court of Appeals in *Jackson*, supra, and of the Ninth Circuit in *Anderson*, supra, should have settled the issues of this case, and the NMB would have been well advised to heed them. The judgment below of the Ninth Circuit Court of Appeals, specifically disapproving, as it does, the NMB's unauthorized and unlawful enlargement of jurisdiction, now settles finally, definitely and properly all questions involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Dated, San Francisco, California,
February 1, 1964.

Respectfully submitted,
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(Appendix Follows)